Simon v. Adzilla, Inc [New Media] et al Doc. 127 Att. 19

EXHIBIT T

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONNECTU LLC, Plaintiff, v. MARK ZUCKERBERG, EDUARDO SAVERIN, DUSTIN MOSKOVITZ, ANDREW MCCOLLUM, CHRISTOPHER HUGHES, and FACEBOOK, INC., Defendants.	CIVIL ACTION NO. 1:04-cv-11923 (DPW) District Judge Douglas P. Woodlock Magistrate Judge Robert B. Collings
MARK ZUCKERBERG and FACEBOOK, INC., Counterclaimants, v. CONNECTU LLC, Counterdefendant, and CAMERON WINKLEVOSS, TYLER WINKLEVOSS, and DIVYA NARENDRA, Additional Counterdefendants.	

RESPONSE TO NOTICE OF NEWLY IDENTIFIED AUTHORITY IN SUPPORT OF CONNECTU LLC'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

On April 14, 2006 the Facebook Defendants filed a Notice of Newly Identified Authority in Support of Facebook Defendants' Motion to Dismiss. Specifically, Facebook Defendants asked the Court to apply the reasoning of *Pramco LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51 (1st Cir. 2006), to Facebook Defendants' pending Motion. ConnectU notes, however, that the facts of the *Pramco* case are distinguishable from those of the instant case, and thus the Court is under no obligation to apply *Pramco* to the current proceedings.

Pramco, which was a case of first impression in the First Circuit, does not apply here because diversity was not lacking when the Complaint was filed on September 2, 2004, either on the face of the Complaint or in reality. Neither the Complaint (Dkt. 1) nor the Amended Complaint (Dkt. 13) alleges that Mr. Zuckerberg was a citizen of ANY state (as Facebook Defendants admitted in their amended reply (Dkt. 111, fn. 2)), Defendants have presented no evidence that he was a citizen of New York when the Complaint was filed, and neither Complaint alleges the domicile of the principals of ConnectU L.L.C. Further, Defendants denied in the November 18, 2004 Answer (Dkt. 14) to the Amended Complaint (there was no Answer to the original Complaint) that Mr. Zuckerberg had a place of residence in New York, and on July 26, 2004, when submitting a Certificate of Incorporation to the State of Delaware, Mr. Zuckerberg provided a California address. See Dkt. 107, Ex. 21 (TFB000060).

Moreover, any alleged lack of diversity became moot when ConnectU filed the Amended Complaint on October 28, 2004, which based jurisdiction on a federal question (copyright infringement). *See The Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995) ("[I]t is well established that the amended pleading supersedes the original pleading . . . . [t]hus our jurisdictional inquiry must proceed on the basis of the First Amended Complaint, not the original one."). The Amended Complaint therefore cured any defect in diversity that may have existed from September 2 to October 28, 2004. 28 U.S.C. § 1653 ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.").

Furthermore, Plaintiff has moved to amend the First Amended Complaint (Dkt. 163) to state that Defendant Zuckerberg's true domicile at the time the original Complaint and the First Amended Complaint were filed (and now), was (and is) the State of California. First Circuit law allows a plaintiff to cure jurisdictional defects to "avoid dismissals on technical grounds." *Odisheldze v. Aetna Life & Casualty Co.*, 853 F.2d 21, 24 (1st Cir. 1988) (holding that plaintiff who incorrectly pleaded defendants' states of incorporation thereby failing to establish diversity jurisdiction on the face of the Complaint must be allowed to cure the deficiency by amending the Complaint).

For these reasons, Plaintiff urges the Court to deny Facebook Defendants' Motion to Dismiss.

DATED: April 26, 2006

/s/ John F. Hornick
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on April 26, 2006